

# The Question is 'Should Insurers Continuously Update Policyholder Records'? Insurance Law Requires the Principles of Administrative Law to Settle Disputes between the Policyholder and the Insurer

N Kilian\*

Online ISSN  
1727-3781

P·E·R

Pioneer in peer-reviewed,  
open access online law publications

## Author

Neels Kilian

## Affiliation

North-West University  
South Africa

Email Neels.Kilian@nwu.ac.za

## Date Submission

21 May 2019

## Date Revised

2 September 2019

## Date Accepted

18 September 2019

## Date published

25 October 2019

Editor Prof C Rautenbach

## How to cite this article

Kilian N "The Question is 'Should Insurers Continuously Update Policyholder Records'? Insurance Law Requires the Principles of Administrative Law to Settle Disputes between the Policyholder and the Insurer" *PER / PELJ* 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6386>

## Copyright



## DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6386>

## Abstract

It is possible to argue that the Financial Advisory Intermediary Services Ombud (hereafter FAIS Ombud) has jurisdiction to consider insurer's decisions not to update their internal administrative systems. The FAIS Ombud may therefore investigate such matters as a complaint as defined in section 1 of the *Financial Advisory and Intermediary Services Act* 37 of 2002 (hereafter the FAIS Act). On the other hand, upon any failure to investigate such complaints, the complainant may approach the Financial Services Tribunal, either to give directions to the FAIS Ombud regarding how to investigate the complaint or to replace this failure with the Tribunal's own investigation/reconsideration of a decision as regulated in section 8 of the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter the PAJA). An administrative decision is defined in the *Financial Sector Regulation Act* 9 of 2017 (hereafter the FSRA) which includes the statutory ombud (example, FAIS Ombud) decisions, such as a decision not to investigate a complaint. When an insurer's decision is in fact an administrative decision, reference should also be made to the FSRA, i.e. an insurer's decision to debar an employee/representative or a decision not to update relevant policyholder records with new information. An insurer's decision not to update policyholder records is not part of this statutory regulation (FSRA) of what constitutes an administrative decision; nevertheless the PAJA could still be relevant to understand when these decisions could be considered a public function. Although the latter falls outside the scope of this article, the *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) is briefly discussed in this article with reference to a public function. In this article, the failure of the FAIS Ombud to investigate a policyholder's (hereafter client) complaint (the insurer is unwilling to update client records) is an administrative decision and it is specifically regulated by FSRA. For this reason, the relevance of the Financial Services Tribunal is discussed when the FAIS Ombud directs the complaint (or the client may also refer a matter in specific circumstances, as if the FAIS Ombud fails to investigate the matter within a reasonable time) to the Financial Services Tribunal for a reconsideration of the decision.

## Keywords

Financial Services Tribunal; *Financial Sector Regulation Act*; public function; administrative decision; policyholder records; reconsideration; fraud; duty of disclosure; insurance law.

## 1 Introduction

The FSRA<sup>1</sup> became law in South Africa on 1 April 2018.<sup>2</sup> Previously, the Financial Services Board made use of an appeal system to consider disputes between clients and insurers.<sup>3</sup> Today, the appeal system is simply known as the Financial Services Tribunal.<sup>4</sup> The jurisdiction of the Tribunal is regulated by section 230 of the FSRA, more specifically, with reference to the PAJA.

In brief, section 230 incorporates relevant administrative law principles regulated by the PAJA when resolving disputes/complaints between an insurer and a client put before the Financial Services Tribunal. The purpose of this article is simply to analyse possible reconsiderations of decisions the Tribunal may make in future when applying the FSRA. This article will also indicate the impact or future impact of administrative law on the principles associated with the short-term insurance law landscape when settling disputes between an insurer and a client.<sup>5</sup> The settlement of disputes is undertaken by the FAIS Ombud and/or other Ombud schemes (the Ombud for Short-Term Insurance (OSTI)) on a daily basis, and in this article we will consider how the Financial Services Tribunal will resolve insurance disputes with reference to the FAIS Ombud's decisions as part of administrative law, as required by section 230 of the FSRA.<sup>6</sup> In doing so, reference will be made

---

\* Cornelius G Kilian. MA (Regensburg) LLM (UP) LLD (UFS). Associate Professor, North-West University, South Africa. Former research fellow, Deakin University and former research fellow, Free State University. I would like to thank the two external blind reviewers for their comprehensive comments and suggestions for drawing my attention to parts of this article that were not clear or needed more attention. I accept full responsibilities for any mistakes or unintended mistakes. E-mail: corneliuskilian@hotmail.com.

<sup>1</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N); s 28 of the *Financial Advisory and Intermediary Services Act* 37 of 2002 (FAIS Act) regulates FAIS Ombud determinations. See the meaning of public in *President of the RSA v SARFU* 2000 1 SA 1 (CC) para 175. "Public" could also mean a section of the public.

<sup>2</sup> Godwin and Schmulow 2015 SALJ 757. The intention of this legislation is to provide financial stability in the design and execution of financial products by insurers, for example.

<sup>3</sup> The Financial Services Board (FSB) has been dissolved and replaced by the Financial Sector Conduct Authority (FSCA). See GN 1433 in GG 41329 of 15 December 2017 (Replacement of Policyholder Protection Rules). A policy is defined to include a policyholder. There is no definition of a policyholder. However, a policy includes a policyholder as either a natural or a juristic person.

<sup>4</sup> FSCA 2018 <https://www.fsc.co.za/Pages/Default.aspx>; FSA 2018 <https://www.fsc.co.za/Enforcement-Matters/Pages/Financial-Service-Tribunal.aspx>. This website explains the purpose of the Financial Services Tribunal.

<sup>5</sup> In South Africa short-term insurance is a term relevant to vehicle insurance, for example. Life insurance, on the other hand, is referred to as long-term insurance.

<sup>6</sup> Pečarič 2016 SAPL 91. The author contends that there is an increase in interest in administrative law, the largest increase among all law subjects; Kilian *Financial*

to a recent unreported Financial Services Tribunal's reconsideration of a decision in *Swanepoel v Outsurance*, where we will be discussing section 230 relevant to the principles of insurance law pertaining to the FAIS Ombud's decision not to investigate Mr Swanepoel's complaint.<sup>7</sup> The complaint was formulated in simple terms – Outsurance has a duty to update client records.<sup>8</sup> To explain this more clearly, the FAIS Ombud took a decision not to investigate Mr Swanepoel's complaint and instead used the FSRA to refer the complaint to the Financial Services Tribunal for a reconsideration of its decision not to investigate the request to update Mr

---

*Services Board Directives* 84. Directive 138 AI indicates the importance of an internal administration system that must comply with all the relevant laws of South Africa. Although this Directive is germane to the *Short Term Insurance Act* 53 of 1998, it indicates the necessity to appoint a public officer to make sure that the internal administration system is compliant. This Directive refers to the King Report (IoDSA *King IV*); obviously the applicability of King IV cannot be overstated in terms of a reliable internal administration system or the relevance of corporate governance to insurance companies. It is also possible to review the decision of the Tribunal by making use of the Uniform High Court Rule 55A, as applied to the *Promotion of Administrative Justice Act* 3 of 2000 (the PAJA). In short, the *Financial Sector Regulation Act* 9 of 2017 (the FSRA) describes administrative decisions as FAIS Ombud decisions and/or certain decisions taken by insurance companies, such as to debar employees. However, the common law is not excluded by the PAJA and it is possible to argue for the review of an insurer's administrative decisions in a court of law; for example, not the actual rejection of a claim but the decision not to maintain and/or administer the internal administration system of the insurer properly, or the failure of the insurer to make a decision.

<sup>7</sup> See in general the Rules for the Financial Services Tribunal (Financial Sector Conduct Authority 2019 <https://www.fsca.co.za/Enforcement-Matters/Financial%20Services%20Tribunal/Financial%20Services%20Tribunal%20Rules%20-%201%20August%202019.pdf>). The Tribunal Rules 6 and 10, for example, refer to the reconsideration of decisions. It is not a ruling or a judgment. The reconsideration was delivered on the 4<sup>th</sup> September 2018 by Judge Harms. The ruling is quoted in full: "Application for Leave to Reconsider: 1. The applicant is dismissed. 2. It is based on vexatious and frivolous grounds. 3. The Ombud does not have the jurisdiction to make a determination as requested."

<sup>8</sup> *Swanepoel v Outsurance Insurance Company* FAB 71/2018 unreported reconsideration of decision. In terms of Rule 25 of the Financial Services Tribunal, new evidence may be introduced for the reconsideration of decisions. To request the unreported matter, the Tribunal may be contacted for reference purposes. The Tribunal's reconsideration is not available on the internet and making reference to or discussing a Tribunal's reconsideration is unusual. However, one should note that the FAIS Ombud's determinations (judgments) are considered equal in status to the civil judgments of a High Court of South Africa, the only difference being that legal representation is not required. In addition, the FAIS Ombud may refer matters to the Tribunal in terms of s 230, which requires the Tribunal to apply the principles as found in the PAJA. For this reason, the Tribunal and its decisions in terms of the way administrative law influences insurance law should form part of the South African academic environment. The OSTI and/or FAIS Ombud is an alternative dispute resolution system in South Africa and a client may approach either the OSTI or the FAIS Ombud relevant to motor vehicle insurance. The FAIS Ombud also has jurisdiction to hear situations arising as a result of complicated investment mistakes by investment companies, which the OSTI is unable to do.

Swanepoel's Outsurance records.<sup>9</sup> On the other hand, had the complainant approached the Financial Services Tribunal directly, section 230 would still have been relevant since it makes reference to this approach and also to approaching the Financial Services Tribunal directly when the statutory ombud (the FAIS Ombud) fails to make a decision within a reasonable time. Section 230(1)(a) states the following:<sup>10</sup>

A person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision by the Tribunal in accordance with this Part.

A decision is defined as follows in section 218(d):

A decision of a statutory ombud in terms of a financial sector law in relation to a specific complaint by a person.<sup>11</sup>

And an omission to a decision which is not required to be made within a specific time period is regulated in section 218(g) as follows:

An omission to such a decision within a reasonable period, if the applicable financial sector law, or rules of, or other requirements pertaining to the decision-maker require the decision to be taken but without prescribing or specifying a period.

The above, more specifically sections 230(1) and 218(d), will be explained further in the following paragraphs with reference to the *Swanepoel v Outsurance* Tribunal case.

---

<sup>9</sup> The FAIS Ombud's decision was delivered on the 10<sup>th</sup> August 2018 by Mr Michael Willmore and the decision states the following: " ... 1. The relief sought is the review and setting aside of the refusal of Outsurance to update and erase policyholder information stored in the insurer's internal administration system, which has now led to the cancellation of an existing policy by Hollard. 2. This Office does not have the mandate to order an insurer to effect such an update or to change their internal administration system. ... Take further notice that a person aggrieved by this decision, has the right to apply for the reconsideration of the decision by the Financial Services Tribunal as contemplated in section 230 of the Financial Sector Regulation Act". Kloppers 2007 *Obiter* 138; Godwin and Schmulow 2015 *SALJ* 762. The interplay between different regulators is referred to as soft law.

<sup>10</sup> Pečarič 2016 *SAPL* 93. The author explains the inability to define administrative law; Kohn 2013 *SAPL* 22-93. This s 230 is relevant to the statutory ombud and/or Ombud Council. The statutory ombud is the FAIS Ombud and the OSTI forms part of the Ombud Council. See the discussion on the Ombud Council by the Department of National Treasury (National Treasury 2017 [http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc\\_A%20known%20and%20trusted%20ombuds%20system%20for%20all\\_September2017.pdf](http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf) 19). For example, a proposed JSE ombud could form part of the Ombud Council.

<sup>11</sup> I.e., the FAIS Act is a financial sector law and in s 1 of the Act it defines a complaint.

## 2 A recent practical example of sections 230(1)(a) and 218(d)

### 2.1 *Swanepoel v Outsurance*

In 2009 Mr Swanepoel submitted a vehicle write-off claim to Outsurance Insurance Company.<sup>12</sup> Mr Swanepoel was the client of the insured vehicle at that time and he made the vehicle available to a friend who had vehicle problems.<sup>13</sup> Subsequently, his friend was involved in an accident and the vehicle was a write-off. In 2009 Outsurance argued that the claim submitted was based on fraud or had a fraudulent motive. Accordingly, Outsurance held that Mr Swanepoel's friend, the driver of the vehicle at the time of the accident, had the intention of writing off the vehicle based on an instruction from Mr Swanepoel. In 2011 a criminal matter was opened against Mr Swanepoel and eventually the matter was declared *nolle prosequi* (termination of legal proceedings by the prosecutor) at the end of 2012. What is unclear in *S v Swanepoel* was the fact that the driver of the vehicle, who it was alleged had been instructed by Swanepoel to deliberately write off the vehicle, was offered money by a company representing the insurer to give such false evidence.<sup>14</sup> At the beginning of 2018 Mr Swanepoel was involved in an accident and the motor vehicle was also consequently a write-off. However, the company with which the vehicle was insured refused to pay the claim on the basis of the non-disclosure of fraud of the 2009 incident on the insurance application form.<sup>15</sup> On this basis Mr Swanepoel approached the FAIS Ombud.<sup>16</sup> The complaint was formulated to request the Ombud to compel Outsurance to update Mr Swanepoel's records, that

---

<sup>12</sup> *Swanepoel v Outsurance Insurance Company* FAB 71/2018 unreported reconsideration of a decision by the Financial Services Tribunal.

<sup>13</sup> *Swanepoel v Outsurance* FSOS 02742-18/19-GP 3 unreported determination. The FAIS Ombud did not make a determination on the correctness of the factual circumstances explained by the applicant. This matter is not available on the internet but the office of the Ombud can be contacted for research purposes. The author of this article assisted the complainant to present his or her complaint to the offices of the FAIS Ombud and Financial Services Tribunal.

<sup>14</sup> *Swanepoel v Outsurance* FSOS 02742-18/19-GP 3 unreported determination. The FAIS Ombud was requested to investigate the complaint where the applicant (Swanepoel) gave a background description of the factual circumstances in 2009, i.e. a company representing Outsurance had offered witnesses R38 000 each to show that Swanepoel had orchestrated his own loss. This statement was also investigated by the South African Police in Pretoria (South Africa) in the matter of *S v Swanepoel* (Gauteng Regional Court Division) (unreported) case number 44/07/2011 and in this case the end result of the investigation of fraud committed by the client was declared *nolle prosequi* by the court on 28 December 2012. For practical reasons, the offering of money and/or fraud committed by the client is irrelevant to this article.

<sup>15</sup> Van Niekerk 2005 *SA Merc LJ* (Part 1) 150-169; Van Niekerk 2005 *SA Merc LJ* (Part 2) 323-339; Donnelly 2018 *SALJ* 593-612.

<sup>16</sup> Millard and Kuschke 2014 *PELJ* 2411-2450.

is, to take note of the unsuccessful criminal prosecution for fraud in 2012, when sharing Mr Swanepoel's 2009 accident with other insurers, or to delete fraud as a consequence of *nolle prosequi*.<sup>17</sup> The FAIS Ombud was not requested to investigate the correctness of the rejected claim by Outsurance or to set aside this claim but rather to consider whether it was appropriate for Outsurance to disclose fraud to other insurers as a result of *nolle prosequi* and therefore Outsurance should update Mr Swanepoel's records.<sup>18</sup> In other words, the records should at least include the unsuccessful criminal prosecution of the rejected claim and not only the phrase "fraudulent claim".<sup>19</sup> The Office of the FAIS Ombud stated the following: that it does not "have the mandate to order an insurer to effect such an update or to change their internal administration system" and as a result, the FAIS Ombud decided not to investigate the complaint.<sup>20</sup>

### 3 The FAIS Act as a financial sector law

To establish whether such a request to compel the insurer to update its records is relevant, the FAIS Ombud focussed on its statutory complaints

<sup>17</sup> *Gert Goeiman v Rekathusa Funeral Parlour* FSOS 00340/14-15/NW 2 para 6. In this matter the Funeral Parlour collected premiums from the insured but the insured had to prove the collection of the premiums. In terms of s 1 of the FAIS Act, a complaint is defined and has reference to financial services; financial services refers to intermediary services as defined in section 1, i.e. the collection of premiums. For all practical purposes, the internal administration system of the Funeral Parlour also contravened proper administration as an intermediary service, as required by s 1. However, the FAIS Ombud did not refer to this in the determination; also see *David Jackson Mbetse v Pieter De Wet* FSOS 00132/13-14/GP3 paras 3 and 9, where the insurer (Pieter De Wet) did not honour the payment of claims. Claims are also a component of intermediary services and therefore constitute part of the definition of a complaint in order to establish jurisdiction for the office of the Ombud. In addition, the respondent was unable to provide/prove policy documents had been sent to the applicant as part of administration or maintenance as an intermediary service. Although the Ombud referred to this, establishing jurisdiction for the FAIS Ombud also forms part of the definition of a complaint; *Van der Merwe v Forum SA Trading* FSOS 05474/14-15 para 8, the insurer failed to update its internal administration system to show that the insured had obtained a certificate for a tracking device. This is also an intermediary service, although the FAIS Ombud did not specifically refer to the administration and/or maintenance of the insurer's internal system. Because the insurer had never updated its system with any certificate, the insurer rejected the claim on the basis that there was no evidence of any tracking device having been fitted to the vehicle.

<sup>18</sup> *Swanepoel v Outsurance* FSOS 02742-18/19-GP 3 unreported determination.

<sup>19</sup> The client requested Outsurance to update its records, ie, *nolle prosequi*, when sharing client information with other insurers.

<sup>20</sup> See fn 9 above.

jurisdiction in section 1 of the above mentioned Act.<sup>21</sup> In section 1 a complaint is defined as follows:<sup>22</sup>

means, subject to section 26(1)(a)(iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative:

- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
- (b) has willfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
- (c) has treated the complainant unfairly;

It is therefore necessary to focus on the definition of financial services provider in section 1:

means any person, other than a representative, who as a regular feature of the business of such a person:

- (a) Furnish advice; or
- (b) Furnish advice and renders an intermediary service; or
- (c) Renders an intermediary service.

To understand what intermediary services are as quoted above, it is also important to make reference to intermediary services as defined in section 1:

means, subject to subsection (3)(6), any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

- (b) with a view to:
  - (i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;

---

<sup>21</sup> Millard and Kuschke 2014 *PELJ* 2414. The authors did not discuss the duties of the insurer after the point of sale.

<sup>22</sup> Kloppers 2007 *Obiter* 133-142; *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) para 9. The Appeal Court referred to s 1 of the FAIS Act, more specifically, the definition of intermediary services.

- (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product;  
or
- (iii) receiving, submitting or processing the claims of a client against a product supplier.

To understand the definition of a client, section 1 defines a client as follows:

means a specific person or group of persons, excluding the general public, who is or may become the subject to whom a financial service is rendered intentionally, or is the successor in title of such person or the beneficiary of such service.

A financial services provider includes either a registered broker or insurer and a financial services provider always performs intermediary services, for example by selling insurance policies or dealing with claims received from a client.<sup>23</sup> From the above definitions it is not clear when the relationship with a client (i.e. a policyholder) ends, such as in relation to keeping in safe custody or administering client records and the like. Section 1 defines a client without making reference to a valid insurance agreement between the insurer (the financial services provider) and the client. If the policy contract is cancelled due to a rejected claim, then for all practical purposes the person is no longer a policyholder but can nevertheless be a client due to the "rendered" financial services, as defined above, relevant to the safe-keeping of client records and suchlike.<sup>24</sup> In the above, intermediary services as defined in section 1(b)(i) makes reference to "maintenance", "administration" and "safe keeping", and all are explicit examples and, thus, are also relevant components of the definition of a complaint to establish the jurisdiction of the FAIS Ombud. In addition, Mr Swanepoel was unaware of the fact that Outsurance as a financial services provider had never updated its internal administrative records to reflect *nolle prosequi* for fraud in 2012.<sup>25</sup> Mr Swanepoel realised this fact only in 2018, when he submitted

<sup>23</sup> Kloppers 2007 *Obiter* 133-142. Broker, insurer and policyholder are not defined by the FAIS Act. S 7(1) requires a licence to operate as either a broker or insurer as a financial services provider.

<sup>24</sup> See fn 3 above, the definition of a policy which includes a policyholder. The FAIS Act, s 16 (2)(b), simply requires adequate and appropriate record-keeping. To update the internal system with information relevant to a rejected claim is probably appropriate, keeping in mind that client information is public information i.e. to be shared with other insurers, and/or records of monthly payments of premiums are to be shared with relevant credit bureaux and other insurers. See in general *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA) that breach of contract is not subject to administrative law.

<sup>25</sup> *Van der Merwe v Forum SA Trading* FSOS 05474/14-15. The insurer failed to disclose the necessary requirements for a tracking device and failed to take note of a device fitted by the client, yet the latter action was never updated on the internal administration system of the insurer; Church 2013 *De Jure* 859-868.



a claim to a different insurer.<sup>26</sup> In this matter the FAIS Ombud simply argued that their offices did not have jurisdiction to consider it as being a complaint and that prescription was also relevant in this regard.<sup>27</sup> Consequently, the FAIS Ombud suggested that the complainant must refer the matter to the Financial Services Tribunal to reconsider the decision of the Ombud.<sup>28</sup> The decision not to investigate the complaint thus became an administrative decision in terms of section 230 of the FSRA, and the consequences of such a decision are regulated by the PAJA in section 8.<sup>29</sup> Section 8 will be discussed later in this article. In addition, it is possible to criticise the referral of the matter to the Financial Services Tribunal because the FAIS Ombud failed to focus on the simple definition of a client, or to explain the relationship between a client and a financial services provider/insurer in regard to administering records, as was discussed in section 1, above to establish jurisdiction (or a mandate to investigate the complaint) for the FAIS Ombud.<sup>30</sup>

#### 4 Intermediary services

In the FAIS Act, it is simply stated that a financial services provider/insurer must "safe keep" the records of clients for a minimum period of five years.<sup>31</sup>

<sup>26</sup> *Diandra Laura Adams v Horn Carstens* FSOS 00086/16-17/WC 3 paras 8, 11, 3, 19. The client only noticed incorrect details of a motor vehicle captured on the internal administration system of the insurer. The insurer had the vehicle as a 2003 model instead of a 2013 model. The action of updating records also falls under intermediary services although the FAIS Ombud did not specifically refer to such services as administration and maintenance. Only the submitted claim was the focus of discussion of the relevant intermediary service. The internal administration system was also unable to provide evidence that the applicant had insured her vehicle incorrectly in terms of the year model. The insurer never updated its internal administration system; *Michelle Collard v Henry Grundling Makelaars* CC FSOS 00750/11-12/GP3 para 23. The requirement to update/maintain/administer the internal administration system of the insurer with new details of the client's risk was established, as in *Quintainie CC v Sencla Financial Services* FOC 2460/07-08/GP3 para 8. It is normal business practice to update client records, for example to add additional risk. At para 34 the client must give appropriate information to an insurer to insure a risk properly in term of s 8(1) of the GCCFSP, which is contained in the FAIS Act. On the other hand, it is not quite clear when the sharing of client information with other insurers is reliable. In this regard, s 8(1) could offer an explanation as to the meaning of reliable information, such as an unsuccessful criminal prosecution, to avoid the possibility of another insurer rejecting a future claim. In this regard, full disclosure of the risk of accepting a client will be made to another insurer.

<sup>27</sup> See fn 9 above.

<sup>28</sup> *Swanepoel v Outsurance* FSOS 02742-18/19-GP 3 unreported determination. In s 27(5)(a) of the FAIS Act, the FAIS Ombud may apply any procedure to investigate a complaint, i.e. with legal representation and/or by mediation only.

<sup>29</sup> Pečarič 2016 *SAPL* 96. Legislation cannot properly explain how to strike a balance between public administrative regulations and individual rights.

<sup>30</sup> Kloppers 2007 *Obiter* 138. Examples are discussed to establish jurisdiction.

<sup>31</sup> FAIS Act, s 18.

It is also stated in section 11 of the General Code of Conduct for Financial Services Providers and their Representatives (hereafter GCCFSP), which is required in terms of section 15 of the FAIS Act, that a financial services provider (i.e., an insurer) must not participate in the poor administration of client records or be liable for an omission, that is, a reluctance to update records.<sup>32</sup> What is of interest is the fact that section 11 has no time period assigned to this section, and one may therefore assume that the good administration of records is required indefinitely; keeping the above definition of a client in mind.<sup>33</sup> It can, *prima facie*, be argued that the consequences of intermediary services as explained in section 1 of the FAIS Act (such as maintaining and managing records) should at least have included Mr Swanepoel's unsuccessful criminal prosecution in 2012, to allow other insurers to take note of it. On the other hand, section 12(a-c) of the GCCFSP also states that the sharing of client information between insurers should always be reliable. There is also no time period assigned to this section for when this duty of sharing reliable information should expire.<sup>34</sup> It is, *prima facie*, arguable that reliable information or records should have included the unsuccessful prosecution of the client for fraud at the end of 2012 and should have been updated indefinitely because section 12(c) requires a financial services provider/insurer to comply with all applicable laws.<sup>35</sup> In focussing on these two sections (sections 11 and 12) of the GCCFSP, it seems that the FAIS Ombud did have the jurisdiction to consider the dispute as a complaint and it is also clear (as indicated above) that intermediary services are not limited to a specific time period, as administration or maintenance is further regulated in sections 11 and 12 of the GCCFSP.<sup>36</sup> It is also therefore possible to argue that prescription could

---

<sup>32</sup> Chapter 4 of the FAIS Act requires a code of conduct for financial services providers.

<sup>33</sup> *Emile de Beer v SAPCOR Broking Services* FSOS 04761/11-12/FS3 paras 7, 25, 26, 34. The insurer failed to update or properly maintain the records of the client due to negligence on the part of the broker. The latter failed to inform the insurer that it should update an endorsement. Here the FAIS Ombud refers specifically to s 11 of the GCCFSP to prevent any omissions.

<sup>34</sup> "Reliable" may indicate a continuous duty, since the safekeeping of records is relevant to the client of the insurer. S 12(a)-(c) states the following: "A provider ... must without limiting the generality of section 11, structure the internal control procedures concerned so as to provide reasonable assurance that: (a) The relevant business can be carried on in an orderly and efficient manner; (b) Financial and other information used or provided by the provider will be reliable; and (c) All applicable laws are complied with."

<sup>35</sup> See fn 34. *Construction Men at Work CC v KRDS Insurance Brokers* FSOS 00458-12/13/KZN 3 paras 20, 21. A financial services provider, i.e. a broker or insurer, must be able to prove compliance with relevant sections of the FAIS Act.

<sup>36</sup> Section 11 of the GCCFSP states: "A provider must at all times have effectively employed the resources, procedures and appropriate technological systems that can reasonably be expected to eliminate as far as reasonably possible, the risk that clients ... will suffer financial loss through ... poor administration, negligence ... or culpable omissions"; Godwin and Schmulow 2015 SALJ 764. Different regulators

not be relevant, since Mr Swanepoel knew of this omission to update his records only when he submitted a claim in 2018.<sup>37</sup> Accordingly, the FAIS Ombud advised the complainant to refer the matter to the Financial Services Tribunal for the reconsideration of their decision not to investigate the complaint (i.e. the updating of records). Before we focus on section 8 of the the PAJA, the following Appeal Court case in South Africa, which explains intermediary services in greater detail, is relevant to our discussion. This case is relevant to arguing why the FAIS Ombud probably acted correctly by referring the matter to the Tribunal for adjudication.<sup>38</sup>

## **5 *Tristar Investments Pty (Ltd) v The Chemical Industries National Provident Fund***

In this case, Tristar signed an agreement with the Chemical Industries Fund to provide certain services on behalf of the fund or to act in the best interest of the fund.<sup>39</sup> Tristar had a financial services licence to provide advice only, but not to provide any intermediary services to any other person or the fund.<sup>40</sup> The fund argued that Tristar not only gave advice but also intermediary services relating to the advice; therefore the agreement between the fund and Tristar was void and unlawful.<sup>41</sup> The Appeal Court in this case focussed on the definition of intermediary services and relied on the common law principle of agency: as a person or agent who acts as a go-between or who acts between other persons.<sup>42</sup> The agreement signed between the parties made provision for monitoring the investment portfolio of the fund and for managing the fund. This included managing and/or administering services relevant to intermediary services as defined in section 1 of the FAIS Act, but did it also include monitor?<sup>43</sup> The purpose of

---

could sign a memorandum of understanding to establish when a specific regulator could decide on a matter and when to refer the matter to a different regulator.

<sup>37</sup> *Construction Men at Work CC v KRDS Insurance Brokers* FSOS 00458-12/13/KZN 3 para 20. The FAIS Ombud states that one must compare the conduct of a financial services provider with the sections in the GCCFSP or FAIS Act. Sometimes the FAIS Ombud uses rationality to determine the main focus area of a complaint – for instance, that a product was sold in violation of the GCCFSP or an administration system was not updated in violation of the GCCFSP.

<sup>38</sup> *Swanepoel v Outsurance Insurance Company* FAB 71/2018 unreported reconsideration of decision.

<sup>39</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013).

<sup>40</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) para 4.

<sup>41</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) para 5.

<sup>42</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) para 7.

<sup>43</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) paras 10-12.

carrying out those administration services was simply to determine whether the fund was performing according to its asset managers' mandate. Tristar did not manage the financial product or the fund. It merely monitored the functions of the asset managers. The Appeal Court stated uncompromisingly that the reason why the legislator had to legislate managing, maintaining and or administering into legislation as intermediary services was unclear, since these are not *per se* always relevant to intermediary services. For example, to monitor the services of another person is neither to administer nor to manage.<sup>44</sup> However, the Appeal Court held that the contract between the fund and Tristar was not only lawful but also valid, because the monitoring in this regard was not part of the definition of intermediary services such as managing and administering.<sup>45</sup> Besides the latter Appeal Court case, the FAIS Ombud in the Swanepoel case could also have indicated that "monitoring" future events relevant to a client is not a realistic duty,<sup>46</sup> or the FAIS Ombud could have explained what amounts to unreliable information, for example the sharing of information pertaining to fraud without reference to *nolle prosequi*. Needless to say, this is only a comment since the Ombud never expressed any opinion on the requirement(s) to update Mr Swanepoel's records or whether those records should be monitored in future as part of administration.<sup>47</sup> In the following paragraph the Tribunal's reasoning is discussed.

## 6 Financial Services Tribunal

Mr Swanepoel subsequently submitted an application to reconsider the decision of the FAIS Ombud to the Financial Services Tribunal in terms of section 230 of the FSRA. As stated previously, it does have jurisdiction to reconsider the FAIS Ombud's failure to make a decision.<sup>48</sup> In this regard it is also possible for a South African court to reconsider a decision of Outsurance not to update their client's records as part of a public function as regulated by the PAJA.<sup>49</sup> This falls outside the scope of this article but

---

<sup>44</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) para 15.

<sup>45</sup> *Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013) para 15.

<sup>46</sup> For example, to keep records for a minimum period of five years and or to share reliable information with other insurers.

<sup>47</sup> In the determinations cited in the above footnotes, the FAIS Ombud seldom refers to intermediary services which form the basis of a complaint to give jurisdiction to the FAIS Ombud.

<sup>48</sup> See para 7 below, i.e. the decision-maker (the FAIS Ombud) refuses to make a decision or takes too long to make an appropriate decision relevant to a client's complaint.

<sup>49</sup> Section 1 of the PAJA defines an administrative action as follows: "Administrative Action means any decision taken, or any failure to take a decision, by: (a) an organ of State, or (i) exercising their power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms

the latter will be briefly referred to in paragraph eight of the article with reference to the *National Horse Racing Authority of Southern Africa v Cyril Naidoo*, where the High Court considered the question "what entails a public function".<sup>50</sup> Before we consider this question it is important to consider the following. One of the grounds submitted by Swanepoel as to why the Financial Services Tribunal must reconsider the decision was the principle of equity between the insurer and the client. The latter statement is supported by section 7(1)(c) of the FSRA, which requires fair treatment of clients. Mr Swanepoel requested the Financial Services Tribunal to apply section 7(1)(c), since it is equitable to update clients' records, and in addition a decision to update records falls within the jurisdiction of the FAIS Ombud.<sup>51</sup> The Financial Services Tribunal did not give an express analysis of intermediary services, nor the relevance of prescription, nor the relevance of updating records with new information, nor the relevance of directing the matter back to the FAIS Ombud with instructions on how to investigate the complaint, nor to replace the decision of the Ombud with that of the Tribunal's decision.<sup>52</sup> The Financial Services Tribunal simply confirmed that the complaint fell outside the authority or jurisdiction of the FAIS Ombud and held that the grounds (discussed above) for why the Tribunal should investigate the matter were frivolous and vexatious. It was a simple

---

of any legislation; or (b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ... ". This will be extremely difficult. See in general Burns *Administrative Law* 149 fn 11. Also see in general Malherbe 2001 *TSAR* 1.

<sup>50</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) para 17. The definition of an administrative action includes the power to exercise a public function.

<sup>51</sup> Kohn 2013 *SAPL* 25-26.

<sup>52</sup> PAJA in s 8. S 8 states the following: "(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders: (a) directing the administrator— (i) to give reasons; or (ii) to act in the manner the court or tribunal requires; (b) prohibiting the administrator from acting in a particular manner; (c) setting aside the administrative action and— (i) remitting the matter for reconsideration by the administrator, with or without directions; or (ii) in exceptional cases— (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or (bb) directing the administrator or any other party to the proceedings to pay compensation; (d) declaring the rights of the parties in respect of any matter to which the administrative action relates; (e) granting a temporary interdictor other temporary relief or as to costs. (2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders— (a) directing the taking of the decision; (b) declaring the rights of the parties in relation to the taking of the decision; (c) directing any of the parties to do, or to refrain from doing, any actor thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or (d) as to costs." Burns *Administrative Law* 138-140. For a general interpretation of the administrative law relationship of inequality; the application of s 7(1)(c) points to the complex interplay with administrative decisions. In this regard see Kohn 2013 *SAPL* 22-93; Henrico 2018 *TSAR* 288-307.

reconsideration of the decision without any reasoning or reasons being provided except for the fact that the complainant was vexatious in his approach.<sup>53</sup> It is difficult to understand why Mr Swanepoel's complaint would be described as frivolous and/or vexatious. Generally, an abuse of court processes is *prima facie* evidence of vexatious behaviour. The *Vexatious Proceedings Act* 3 of 1956 in section 2(a) states the following, as an example:<sup>54</sup>

If, on an application made by the State Attorney or any person acting under his written authority, the court is satisfied that any person has persistently and without any *reasonable ground* instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing the person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an *abuse* of the process of the court and that there is *prima facie* ground for the proceedings.

However, in the Swanepoel matter the word "fraud" is used on the Outsurance internal administration system. It is a serious matter to label a client as a fraudster based on the subjective investigation of the insurer and to ignore the unsuccessful criminal prosecution of the client in 2012.<sup>55</sup> The consequences of fraud are extreme in the commercial world. For example, the rejection of a claim based on fraud would prevent the obtaining of future insurance. For this reason, it is unclear how the Financial Services Tribunal simply decided that the complainant was vexatious without any reasoning provided in its reconsideration of the FAIS Ombud's decision. Another reason could be the fact that it is difficult to apply the GCCFSP in practice, namely sections 11 and 12, as was discussed earlier pertaining to a time period.<sup>56</sup>

## 7 PAJA

Section 230 of the FSRA refers to the PAJA. Before commencing with the discussion in this section, it is important to consider who could be a decision

---

<sup>53</sup> Researchers may contact the office of the Financial Services Tribunal to request the reconsideration of the decision. An email can be sent to [leg.appealboard@fsca.co.za](mailto:leg.appealboard@fsca.co.za).

<sup>54</sup> Emphasis added. Hiemstra and Gonin *Trilingual Legal Dictionary* defines "vexatious" as "denoting to irritate" and "frivolous" as "meaningless"; Saunders 2006 *Acta Juridica* 426. The development of administrative law by legislation is discussed by the author; Henrico 2018 *TSAR* 293. The application of administrative law or the PAJA should lead to certainty in the law.

<sup>55</sup> See 2.1 fn. 14.

<sup>56</sup> Henrico 2018 *TSAR* 294. To establish certainty in the law, it is important to take note of how administrative law is pleaded before a court. This may be arbiter since the Tribunal did not consider the applicant's pleadings.

maker in terms of section 218 of the FSRA.<sup>57</sup> The reason why these decisions are specifically identified as administrative decisions stems from the complexities of the South African common law regarding how to identify the failure to take a decision as part of administrative law. To some extent the PAJA defines an administrative decision, but it is very difficult to understand a public function in practice.<sup>58</sup> The PAJA does not give suitable examples of different administrative decisions, as will be seen in paragraph eight below in the *National Horse Racing Authority of Southern Africa v Cyril Naidoo*.<sup>59</sup> Examples of statutorily defined administrative decisions are explained in the FSRA as follows:

- a) a decision by an Ombud;<sup>60</sup>
- b) a decision by an insurance company relevant to employee debarment;<sup>61</sup>
- c) a decision by a person in terms of the Financial Markets Act;<sup>62</sup>
- d) an omission to take a decision within a period relevant to a decision maker;<sup>63</sup>
- e) an omission to take a decision within a reasonable period when a financial sector law requires such a decision;<sup>64</sup> and
- f) action taken as a result of such a decision amongst others.<sup>65</sup>

Examples (b)-(d) fall outside the scope of this article. Action to be taken (example (f) above) as a result of such a decision is discussed in paragraph eight below with reference to section 8 of the FSRA.<sup>66</sup> Example (e) above is part of section 26(1)(a)(viii) of the FAIS Act and it relates to a time limit within which a FAIS Ombud must deliver a determination. Should the time

<sup>57</sup> Burns *Administrative Law* 148-149. The annual general meeting of medical scheme members does not constitute an administrative decision and is not subject to review. An administrative decision or action is not defined by the Constitution of South Africa.

<sup>58</sup> *Pennington v Friedgood* 2002 3 BCLR 298 (C). What constitutes a public function or power is important for one to be able to identify possible administrative decisions in terms of s 1 of the PAJA.

<sup>59</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N).

<sup>60</sup> FSRA in s 218(a).

<sup>61</sup> FSRA in s 218(b).

<sup>62</sup> FSRA in s 218(c).

<sup>63</sup> FSRA in s 218(f).

<sup>64</sup> FSRA in s 218(g) and (i).

<sup>65</sup> FSRA in s 218(h).

<sup>66</sup> In s 8, the PAJA furnishes the remedies applicable for instance to the failure by the FAIS Ombud to make an administrative decision; Grote 2004 *SAPL* 513-514.

limit be exceeded without receiving a determination, this constitutes a decision in terms of the FSRA. With respect to the above decisions, a decision-maker includes the following persons/organisations:

- a) A financial sector regulator such as the Financial Sector Conduct Authority.<sup>67</sup>
- b) An ombud Council such as OSTI in future.<sup>68</sup>
- c) A statutory ombud such as the FAIS Ombud.<sup>69</sup>

In the above, (a) and (b) fall outside the scope of this article. From the above it is clear that an insurer (such as Outsurance) is not a "decision-maker" in terms of section 218 of the FSRA. In this regard, in order to argue that Outsurance is also a decision-maker the relevance of a public function is important. In this regard, decisions or decision-makers of the FSRA are irrelevant. In other words, an Outsurance decision not to update client records cannot be reconsidered by section 230 of the FSRA. In this regard a court can review the decision as part of a public function of the PAJA.<sup>70</sup>

## **8 PAJA pertaining to a public function of the insurer without the application of FSRA**

In the *National Horse Racing Authority of Southern Africa v Cyril Naidoo*, Naidoo was banned by a decision of the National Horse Racing Authority of Southern Africa from participating in the training of horses for races since he had used drugs to gain an unfair advantage as a horse trainer.<sup>71</sup> The High Court had to decide whether this decision fell under the PAJA.<sup>72</sup> In its decision the court focussed on the definition of an administrative action in section 1, which includes a decision of a natural or juristic person in terms of an empowering provision which adversely affects the rights of any person when exercising a public power or function.<sup>73</sup> In this regard the court

<sup>67</sup> FSRA in s 218(a) decision maker.

<sup>68</sup> FSRA in s 218(b) decision maker.

<sup>69</sup> FSRA in s 218(e) of decision maker.

<sup>70</sup> See in general Grote 2004 *SAPL* 513, 530; *Swanepoel v Outsurance Insurance Company* FAB 71/2018 unreported reconsideration of decision.

<sup>71</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) paras 17-24.

<sup>72</sup> Burns *Administrative Law* 148-149. See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (A) where the court had to decide whether the decisions of the JSE are in fact a public function, and confirmed that they were. Also see *Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 4 SA 781 (W) 791, that a circular sent to shareholders is not subject to administrative review; Saunders 2006 *Acta Juridica* 423-449.

<sup>73</sup> Section 1 of the PAJA defines an administrative action as follows: "Administrative Action means any decision taken, or any failure to take a decision, by: (a) an organ



focussed on the constitution of the given National Horse Racing Authority of Southern Africa as an empowering provision.<sup>74</sup> In terms of whether such a decision (the banning of Naidoo) is a public function, the court simply held that horse racing is regulated by the government,<sup>75</sup> and therefore ticket sales and/or inviting the public to races and/or debarring persons from participating in races are indeed public functions.<sup>76</sup> For this reason, the court stated that such a decision between private individuals should be subjected to the provisions of the PAJA.<sup>77</sup> Wallis J held the following view:<sup>78</sup>

I can find nothing in the general language of the definition of administrative action in PAJA that demonstrates a clear intention to exclude sporting bodies that regulate their sport in terms of a constitution and rules. No such exclusion appears from the language itself which propounds a different test of exercising a public power or performing a public function. Sport has a substantial influence in our society and can involve substantial sums of money as well as exercising control over who may earn their living from involvement in sporting activities. Sport raises important public issues as is apparent from the fact that the President has seen fit to appoint commissions of enquiry into both rugby and cricket. Government has a substantial interest in sport as evidenced by the existence of the department of Sport and Recreation and the creation of the Sports Commission.

The Government also regulates financial services by legislation and the legislation regulates the relationship between the FAIS Ombud, the client and the insurer on the one hand and on the other hand the FAIS Ombud and the Financial Services Tribunal.<sup>79</sup> However, irrespective whether or not it is a decision-maker in terms of the FSRA (for example the FAIS Ombud) or a decision maker in terms of a public function of the PAJA (for example Outsurance), in both cases section 8 of the PAJA is relevant and applicable. Therefore, in our view it is possible for the Financial Services Tribunal to

---

of State, or (i) exercising their power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ... ."

<sup>74</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) para 20.

<sup>75</sup> See in general the meaning of public power in *Van Zyl v New National Party* 2003 10 BCLR 1167 (C) para 75.

<sup>76</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) paras 13, 29. S 8 of the PAJA allows for natural justice between the parties. See also in general the relationship between contractual rights and administrative law in *Basson t/a Repcomm Community Repeater Services v Post-Master General* 1994 3 SA 224 (SE).

<sup>77</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) para 16.

<sup>78</sup> *National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N) para 22.

<sup>79</sup> FAIS Act and FSRA as examples.

deliver either one of the following two reconsiderations relevant to the FAIS Ombud's decision not to investigate the matter.<sup>80</sup>

- a) In terms of a failure to take a decision on the part of the FAIS Ombud,<sup>81</sup> the Ombud could be directed by the Financial Services Tribunal to take a decision to transfer the term "fraud" to that part of the internal administration system which will not be shared with other insurance companies.<sup>82</sup>
- b) It could set aside the failure of the FAIS Ombud to take a decision and replace the decision with that of the Financial Services Tribunal; that is, the Tribunal makes a decision regarding the way Outsurance must update its internal administration system, for example by deleting the term "fraud" as a result of the unsuccessful criminal prosecution.<sup>83</sup>
- c) Scenario - (a) and (b) above – could apply equally to Outsurance as a "decision-maker", and a court could either direct (a) or (b) above to Outsurance if a public function is established by a court in terms of the PAJA. In this regard FSRA is not relevant because Outsurance is not a decision-maker.<sup>84</sup>

Mr Swanepoel realised only in 2018 that the records had never been updated, therefore the FAIS Ombud's argument that prescription could exist should have been irrelevant when one considers section 5.<sup>85</sup> Prescription should be relevant only when the client is aware of the fact that the records have never been updated by the insurer.<sup>86</sup>

## 9 Conclusion

It remains unclear as to how the Tribunal could merely have held that Mr Swanepoel's complaint was vexatious. The Tribunal had a golden opportunity to explain intermediary services and/or to interpret the sharing of information as a public function or at least to have offered a just interpretation of the rights between the parties (Outsurance and Mr

---

<sup>80</sup> Van Heerden 2009 *Journal of Public Administration* 183-195.

<sup>81</sup> Section 6(2)g of the PAJA.

<sup>82</sup> Section 8(2)a-d of the PAJA.

<sup>83</sup> Section 8(1)(c)(ii) of the PAJA.

<sup>84</sup> See fn 71.

<sup>85</sup> Burns *Administrative Law* 57-60. S 195(1)(g) of the *Constitution of the Republic of South Africa*, 1996 requires that a public record should always be accurate in information. To be precise, prescription is not relevant unless s 5 of the PAJA is applicable.

<sup>86</sup> See prescription as regulated in s 27(2) of the FAIS Act.

Swanepoel).<sup>87</sup> In terms of the Tribunal's decision, the applicant is labelled indefinitely as a fraudster on the Outsurance system.<sup>88</sup> In addition, the Tribunal did not consider whether the future sharing of information pertaining to the fraud was the sharing of reliable or unreliable information.<sup>89</sup> It is evident that a reluctance to update internal administration systems or records with new and relevant information could indeed constitute grounds for a complaint in terms of section 1 of the FAIS Act.<sup>90</sup> However, this Act is not clear as to when intermediary services should be terminated between an insurer and its clients, since the FAIS Act does not define a client clearly. This is a tacit indication that intermediary services could continue indefinitely.<sup>91</sup> Furthermore, the FAIS Act contains no specific time period after which all client records or information should be destroyed.<sup>92</sup> In addition, in regard to the failure of the FAIS Ombud to take a decision, the Tribunal could have made a decision by either referring the complaint back to the FAIS Ombud with further instructions on how to make a decision or by replacing the failure to make a decision with a Tribunal decision.<sup>93</sup> The Tribunal did not analyse the legal arguments presented above, and it remains a mystery as to why the complainant was vexatious.<sup>94</sup> Maybe the time is ripe for South Africa to rewrite the FAIS Act to render it clearer and more coherent.<sup>95</sup>

## Bibliography

### Literature

Burns *Administrative Law*

Burns Y *Administrative Law* (LexisNexis Butterworths Durban 2013)

Church 2013 *De Jure*

Church J "Jerrier v Outsurance Insurance Company Ltd 2013 JDR 0562 (KZP) - The Duty to Disclose: An Ongoing Problem?" 2013 *De Jure* 859-868

---

<sup>87</sup> Burns *Administrative Law* 54.

<sup>88</sup> In the European Union, General Data Protection Regulation (GDPR) contains the right to be forgotten and the right to be erased as contained in art 17 regarding a duty to rectify records or to erase personal data; see Intersoft Consulting 2018 <https://gdpr-info.eu/issues/right-to-be-forgotten/>.

<sup>89</sup> See 1 above.

<sup>90</sup> See 3 above.

<sup>91</sup> See 5 above.

<sup>92</sup> See 7 above.

<sup>93</sup> See 8 above.

<sup>94</sup> See s 8 of the FAIS Act, which explains the remedies for the complainant.

<sup>95</sup> See in general *Conduct of Financial Institutions Bill* 2018.

Donnelly 2018 *SALJ*

Donnelly D "Do you Always Get Something Out? The Impact of the Insurance Act 18 of 2017 and Revised Policyholder Protection Rules on Material Misrepresentation and Non-Disclosure" 2018 *SALJ* 593-612

Godwin and Schmulow 2015 *SALJ*

Godwin AJ and Schmulow AD "The Financial Regulation Bill in South Africa, Second Draft: Lessons from Australia" 2015 *SALJ* 756-768

Grote 2004 *SAPL*

Grote R "The Scope of Judicial Review of Administrative Action and the Changing Rule of Law: Some Comparative Reflections" 2004 *SAPL* 513-531

Henrico 2013 *TSAR*

Henrico R "Subverting the Administrative Justice Act in Judicial Review: The Cause of Much Uncertainty in South African Administrative Law" 2013 *TSAR* 288-307

Hiemstra and Gonin *Trilingual Legal Dictionary*

Hiemstra VG and Gonin HL *Trilingual Legal Dictionary* (Juta Cape Town 2000)

IoDSA *King IV*

Institute of Directors Southern Africa *King IV Report on Corporate Governance for South Africa* (Institute of Directors Southern Africa Sandton 2016)

Kilian *Financial Services Board Directives*

Kilian CG (ed) *Financial Services Board Directives 2000-2015* (Sunmedia Pretoria 2015)

Kloppers 2007 *Obiter*

Kloppers H "The Regulation of Advice within the Financial Services Sector" 2007 *Obiter* 133-142

Kohn 2013 *SAPL*

Kohn L "Our Curious Administrative Love Triangle: The Complex Interplay between the PAJA, the Constitution and the Common Law" 2013 *SAPL* 22-93

Malherbe 2001 *TSAR*

Malherbe EFJ "Privatisation and the Constitution: Some Explanatory Observations" 2001 *TSAR* 1-15

Millard and Kuschke 2014 *PELJ*

Millard D and Kuschke B "Transparency, Trust and Security: An Evaluation of the Insurer's Precontractual Duties" 2014 *PELJ* 2411-2450

Pečarič 2016 *SAPL*

Pečarič M "Administrative Law: Indefinable, but Necessary and very Much Alive" 2016 *SAPL* 91-113

Saunders 2006 *Acta Juridica*

Saunders C "Apples, Oranges and Comparative Administrative Law: Practical Steps" 2006 *Acta Juridica* 423-449

Van Heerden 2009 *Journal of Public Administration*

Van Heerden M "Promotion of Administrative Justice Act 2000: Three Types of Administrative Actions" 2009 *Journal of Public Administration* 183-195

Van Niekerk 2005 *SA Merc LJ* (Part 1)

Van Niekerk JP "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty" (Part 1) 2005 *SA Merc LJ* 150-169

Van Niekerk 2005 *SA Merc LJ* (Part 2)

Van Niekerk JP "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty" (Part 2) 2005 *SA Merc LJ* 323-339

## **Determinations**

*Construction Men at Work CC v KRDS Insurance Brokers* FSOS 00458-12/13/KZN 3

*David Jackson Mbetse v Pieter De Wet* FSOS 00132/13-14/GP3

*Diandra Laura Adams v Horn Carstens* FSOS 00086/16-17/WC 3

*Emile de Beer v SAPCOR Broking Services* FSOS 04761/11-12/FS3

*Gert Goeiman v Rekathusa Funeral Parlour* FSOS 00340/14-15/NW 2

*Michelle Collard v Henry Grundling Makelaars CC* FSOS 00750/11-12/GP3

*Quintainie CC v Sencla Financial Services* FOC 2460/07-08/GP3

*Swanepoel v Outsurance Insurance Company* FAB 71/2018 unreported reconsideration of decision

*Swanepoel v Outsurance* FSOS 02742-18/19-GP 3 unreported determination

*Van der Merwe v Forum SA Trading* FSOS 05474/14-15

### **Case law**

*Basson t/a Repcomm Community Repeater Services v Post-Master General* 1994 3 SA 224 (SE)

*Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA)

*Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 4 SA 781 (W)

*Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (A)

*National Horse Racing Authority of Southern Africa v Cyril Naidoo* 2010 3 SA 182 (N)

*Pennington v Friedgood* 2002 3 BCLR 298 (C)

*President of the RSA v SARFU* 2000 1 SA 1 (CC)

*S v Swanepoel* (Gauteng Regional Court Division) (unreported) case number 44/07/2011

*Tristar Investments (Pty) Ltd v The Chemical Industries National Provident Fund* 2013 ZASCA 59 (16 May 2013)

*Van Zyl v New National Party* 2003 10 BCLR 1167 (C)

### **Legislation**

*Conduct of Financial Institutions Bill* 2018

*Constitution of the Republic of South Africa*, 1996

*Financial Advisory and Intermediary Services Act* 37 of 2002

*Financial Sector Regulation Act* 9 of 2017

*Promotion of Administrative Justice Act* 3 of 2000

*Short-Term Insurance Act* 53 of 1998

*Vexatious Proceedings Act* 3 of 1956

### **Government publications**

GN 1433 in GG 41329 of 15 December 2017 (Replacement of Policyholder Protection Rules)

Uniform High Court Rules

### **Internet sources**

FSA 2018 <https://www.fsca.co.za/Enforcement-Matters/Pages/Financial-Service-Tribunal.aspx>

Financial Sector Conduct Authority 2018 *Financial Services Tribunal* <https://www.fsca.co.za/Enforcement-Matters/Pages/Financial-Service-Tribunal.aspx> accessed 1 September 2018

FSCA 2018 <https://www.fsca.co.za/Pages/Default.aspx>

Financial Sector Conduct Authority 2018 *Home Page* <https://www.fsca.co.za/Pages/Default.aspx> accessed 1 September 2018

Financial Sector Conduct Authority 2019 <https://www.fsca.co.za/Enforcement-Matters/Financial%20Services%20Tribunal/Financial%20Services%20Tribunal%20Rules%20-%201%20August%202019.pdf>

Financial Sector Conduct Authority 2019 *Financial Services Tribunal Rules* <https://www.fsca.co.za/Enforcement-Matters/Financial%20Services%20Tribunal/Financial%20Services%20Tribunal%20Rules%20-%201%20August%202019.pdf>

<https://www.fsca.co.za/Enforcement-Matters/Financial%20Services%20Tribunal/Financial%20Services%20Tribunal%20Rules%20-%201%20August%202019.pdf> accessed 4 September 2019

Intersoft Consulting 2018 <https://gdpr-info.eu/issues/right-to-be-forgotten/>  
Intersoft Consulting 2018 *GDPR – Right to be Forgotten* <https://gdpr-info.eu/issues/right-to-be-forgotten/> accessed 10 May 2018

National Treasury 2017 [http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc\\_A%20known%20and%20trusted%20ombuds%20system%20for%20all\\_September2017.pdf](http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf)

National Treasury 2017 *A Known and Trusted Ombud System for All*  
[http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc\\_A%20known%20and%20trusted%20ombuds%20system%20for%20all\\_September2017.pdf](http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf) accessed 14 August 2018

## List of Abbreviations

GCCFSP	General Code of Conduct for Financial Services Providers and their Representatives
GDPR	General Data Protection Regulation
FAIS Act	Financial Advisory and Intermediary Services Act
FAIS Ombud	Financial Advisory and Intermediary Services Ombud
FSCA	Financial Sector Conduct Authority
FSB	Financial Services Board
FSRA	Financial Sector Regulation Act 9 of 2017
IoDSA	Institute of Directors Southern Africa
OSTI	Ombud for Short-Term Insurance
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	SA Mercantile Law Journal
SALJ	South African Law Journal
SAPL	Southern African Public Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg